



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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09-29-06

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Order Instituting Rulemaking
Concerning Relationship Between
California Energy Utilities and Their
Holding Companies and Non-Regulated
Affiliates

Rulemaking 05-10-030
(Filed October 27, 2005)

**POST-WORKSHOP COMMENTS
OF THE DIVISION OF RATEPAYER ADVOCATES**

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September 29, 2006

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Pursuant to the September 12, 2006 Administrative Law Judge's Ruling Proposing Draft Rules for Workshop Discussion, the Division of Ratepayer Advocates (DRA) files these post-workshop comments in response to the discussion held at the September 21, 2006 workshop. As indicated in their September 19, 2006 pre-workshop comments, Respondents¹ continue to oppose all of the proposed changes to the existing rules as unnecessary and counterproductive. Other than restating the general opinion there is no need to revise the existing Affiliate Transaction Rules, the Respondents do not offer new arguments to the September 21 workshop except to state that some of the proposed rules may be too broad. In this respect, DRA agrees the proposed rules need to be clarified, and recognizes that some exceptions may be warranted.

¹ Respondents are Southern California Edison Company, Edison International, Pacific Gas and Electric Company, PG&E Corporation, Southern California Gas Company, San Diego Gas & Electric Company, and Sempra Energy.

I. PROPOSED RULE V.E. REGARDING SHARED SERVICES NEEDS TO BE CLARIFIED

Rule V.E. adds to the existing list of prohibited shared services between the utilities and their affiliates and holding companies: financial planning and analysis, regulatory affairs, lobbying, legal, risk management.² During the September 21, 2006 workshop, the Respondents objected to changes proposed by Rule V.E. Specifically, San Diego Gas & Electric (SDG&E) and Southern California Gas (SoCalGas) stated that the proposed rules were not possible, and argued the services were too highly integrated and would disrupt operations.

DRA concurs the added examples of prohibited shared services cited Rule V.E. may be too broad. However, DRA does not agree with Respondents that the proper solution would be to leave Rule V.E. unmodified. Rather, the Commission should narrow the prohibition of shared services to areas in which the transfer of knowledge creates an inherent conflict of interest. For example, at the workshop, it was suggested Rule V.E. can be further clarified to allow shared services of attorneys involved in tax, employment, and other such areas of law that do not implicate the concerns identified in the September 12th ALJ Ruling and the Amended OIR. DRA suggests the prohibition of shared services would include procurement-related fields within the areas of legal, financial planning and analysis, and risk management. Essentially, DRA is concerned that a specific prohibition should extend to shared personnel involved in the areas of “Resource Procurement,” as defined in draft Rule I.H. The Commission should consider revising the proposed rules to reflect the examples cited above.

² DRA comments filed September 7, 2006 supported adoption of these additional separation rules.

II. THE REPORTING REQUIREMENTS SERVE A COMPELLING STATE INTEREST TO PROTECT RATEPAYER INTERESTS AND DO NOT UNNECESSARILY BURDEN THE UTILITIES

Respondents also object to the Affiliate Transaction Rules proposed Rule IV.C., which requires the utility to report to the Commission, on a semi-annual basis, any exchange of or discussion about non-public information between a utility and its holding company or any affiliates. Disclosure is required when any of the six specific areas are triggered. In comments, Respondents raise the restrictions on communications bear “a heavy presumption against [their] constitutional validity.” (Respondent’s Comments to Amended OIR, filed August 7, 2006, p. 71.) Respondents also repeatedly argued at the workshop the new disclosure rules would have a “chilling effect” on speech. In pre-workshop comments, Respondents state, “It is simply impractical and unreasonable to require utilities to report all communications with the holding company on these topics, including the date, persons involved, and nature of information provided. In addition, requiring such reports would chill lower-level employees from reporting potential problems to senior management.” (Respondent’s Pre-Workshop Comments, filed September 19, 2006, p.6.) These arguments are without merit.³

Even if it can be considered protected speech, the Commission’s order would be valid if the proposed rule were a “narrowly tailored means of serving a compelling state interest.”⁴ The proposed rule serves a legitimate public purpose to protect ratepayer interests. The reporting requirements are necessary address “the very real conflict of interest that creates an impetus for preferential treatment, unfair competitive advantage, or the sharing of competitively sensitive confidential information within the partly regulated, mostly unregulated corporate family.” (ALJ Ruling dated September 12, 2006, p. 2.) DRA also believes rising advances in technology (i.e., email, corporate intranets,

³ DRA also addresses Respondent’s First Amendment arguments in DRA’s Reply Comments, filed August 18, 2006.

⁴ *Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1 (1986) , at 19; *Consolidated Edison Co. v. Public Service Comm’n of N. Y.*, 447 U.S. 530 (1980), at 535; *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), at 786.

and internal networks, etc.) create more opportunities to exchange sensitive confidential information that may lead to unfair competitive advantage. To address the changing regulatory and technology landscape, the proposed reporting requirements will serve by increasing utility employee awareness and accountability.

The proposed rule is also narrowly tailored to serve this compelling state interest. As articulated by Commission Staff at the workshop, the rule is imposed only on the utilities themselves, and not on the Holding Companies or affiliates. The rule also allows the utilities flexibility in how they choose to comply with the semi-annual report. For example, the utilities can develop a form for employees to record their communications. The form could easily comply with Rule IV.C., and would include: the date and place of the exchange or discussion; the names and positions of the people who communicated or received the information; and the nature of the information. Moreover, the requirement for disclosure is limited to the six topical areas. Commission Staff indicated it considered and rejected a proposed rule to require the utility to compose minutes. Instead, Commission Staff suggested utilities can summarize their activity in aggregate when developing the semi-annual report.

DRA agrees the semi-annual report is the least restrictive means to address the inherent conflict of interest that exists within the utility/Holding Company/affiliate relationships. Record-keeping of communications (whether telephonic, email, or personal meeting) is not a new concept for most professionals. As mentioned in the workshop, attorneys habitually keep detailed records of their interactions for billing and documentation. And to the extent the utilities already have firewalls in place, the rule would not affect those individuals. For example, the utilities must comply with FERC's Standards of Conduct for Transmission Providers, which require employees working in a utility's transmission operations function independently and separately from those working for its energy and marketing affiliates. (18 C.F.R. §§ 358.2-358.4.)

III. DRA REQUESTS COMMISSION STAFF INCORPORATE INTO THE RECORD ADDITIONAL EVIDENCE

During the workshop, Commission Staff indicated that it had additional information regarding its observations and findings in the affiliate audits which further enhance the need to modify the Affiliate Transaction Rules. DRA requests the information Commission Staff referenced be submitted into the record. DRA also requests Commission Staff to incorporate into the record evidence of its conversations with Ratings agencies that have confirmed the proposed rules would increase a utility's credit ratings.

Respectfully submitted,

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Executed on September 29, 2006 at San Francisco, California.

/s/ **MARTHA PEREZ**

Martha Perez

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